UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

HERMAN H. GATCHELL, SR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-272-P-H***
	)	
LEGEND SPORTS, INC., et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff has filed a motion for summary judgment "against all Defendants on all Counts of Plaintiff's Amended Complaint." Plaintiff's Motion for Summary Judgment ("Motion") (Docket No. 24) at 1. Default has been entered against defendants Gowell and Staples, Docket Nos. 7 & 16, and the plaintiff appears to be seeking the entry of judgment on these defaults through this motion. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Memorandum"), attached to Motion, at 2. The plaintiff's motion to dismiss defendant Legend Sports, Inc. has been granted. Docket No. 13. The plaintiff failed to respond to an order to show cause why this action should not be dismissed against defendant Tangent Insurance Company and the dismissal accordingly was entered. Docket No. 29. The substantive motion for summary judgment, therefore, can be addressed only to defendants Trotter and Clarkson. Defendant Clarkson, appearing *pro se*, has filed an objection to the motion. Defendant Trotter has not responded to the motion. I recommend that the motion be denied.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

Defendant Trotter filed no objection to the motion and must therefore be deemed to have waived objection. Local Rule 7(b). This court will not automatically grant a motion for summary

judgment to which no timely objection has been filed, but rather will consider the merits of the motion on the basis of the materials filed by the moving party. *Redman v. FDIC*, 794 F. Supp. 20, 22 (D. Me. 1992). Under Local Rule 56 all material facts set forth in the moving party's properly supported statement of material facts are deemed admitted unless properly controverted by a statement of material facts filed by the nonmoving party. *Cutler v. FDIC*, 796 F. Supp. 598, 600 (D. Me. 1992) ("When the party opposing summary judgment fails to file a statement of material facts, the party has waived objection to the moving party's statement of material facts to the extent that the movant's statement is supported by appropriate record citations.").

II. Factual Background

The following material facts are supported in the summary judgment record and are undisputed.[1] Defendant Trotter acted as a broker-dealer for the sale of unregistered securities issued by Legend Sports, Inc. Affidavit of Herman H. Gatchell, Sr. ("Plaintiff's Aff.") (attached to Plaintiff's Motion for Summary Judgment dated January 4, 1999 (Docket No. 17)) ¶ 2. Trotter employed or contracted with Gowell to offer and sell these securities in Maine. *Id*; Affidavit of Lawrence C. Gowell, Jr. ("Gowell Aff.") (Docket No. 14) ¶¶ 3, 8. On or about July 24, 1996 Gowell sold to the plaintiff a promissory note issued by Legend Sports, Inc., a copy of which is Exhibit A to the amended complaint, in the amount of $100,441.57. Plaintiff's Aff. ¶ 5; Amended Complaint

[1] The affidavits of defendant Gowell (Docket No. 14) and the plaintiff (attached to the plaintiff's originally filed, but subsequently stricken, motion for summary judgment, Docket No. 17), upon which the plaintiff relies to support his statement of material facts, are made on information and belief, rather than on personal knowledge as required by Fed. R. Civ. P. 56(e). Defendant Clarkson has made no objection to the affidavits on this basis, so the statements made therein may nonetheless be considered by this court in connection with this motion.

(Docket No. 5), Exh. A ("Note"). In making this sale, Gowell was acting on behalf of Trotter. Plaintiff's Aff. ¶ 5; Gowell Aff. ¶¶ 6, 8. The promissory note was not registered with the Maine Securities Administrator and did not qualify for an exemption from the registration requirements imposed on securities by the state of Maine and the United States. Plaintiff's Aff. ¶ 6. Gowell sold promissory notes similar to the one he sold to the plaintiff to approximately twenty-one other investors in Maine. *Id*. ¶ 26.

The promissory note was due and payable nine months from the date it was issued. Note, ¶ 1. The plaintiff made a demand upon Legend Sports, Inc. for payment on the note on or about April 9, 1997. Plaintiff's Aff. ¶ 8. He has received no payment. *Id*. Trotter did not inform the plaintiff that he was not licensed as a broker-dealer in Maine or that he was exempt from the state's licensing requirements. *Id*. ¶ 12.

Tangent Insurance Company ("Tangent") issued a bond to the plaintiff in connection with the note. Plaintiff's Aff. ¶ 18; Amended Complaint, Exh. B ("Bond"). The bond purported to guarantee payment of the note. Plaintiff's Aff. ¶ 18; Bond at [1]. Neither Trotter nor Clarkson[2] disclosed to the plaintiff that Tangent was not authorized to do business in Maine. Plaintiff's Aff. ¶ 19. Neither Tangent nor Clarkson has made payment to the plaintiff pursuant to the bond. *Id*. ¶ 20. The plaintiff would not have purchased the note if he had been informed of "the truth as to the above statements." *Id*. ¶ 23. Trotter acted together with the other named defendants in a common scheme to deceive the plaintiff. *Id*. ¶ 25. Clarkson was the agent for notice to the surety listed on the bond. Clarkson Aff. ¶ 2(a); Bond at [2].

[2] The plaintiff contends that Clarkson controlled Tangent and the issuance of the bond involved in this case. Plaintiff's Aff. ¶¶ 3, 21. Clarkson denies these allegations. Affidavit of Francis Clarkson ("Clarkson Aff.") (Docket No. 28) ¶¶ 2(a)-(c), (e)-(f).

III. Discussion

A. Defendants Trotter and Clarkson

The amended complaint asserts nine claims against Trotter and ten against Clarkson. The nine claims, all of which are asserted against both, are the following: Count I, violation of 15 U.S.C. § 78j, "Rule 10b-5 and other rules and regulations of the U.S. Securities Exchange Commission [sic], through means or instruments of transportation or communication in interstate commerce, and through the mails," Amended Complaint ¶ 40; Count II, violation of 15 U.S.C. § 77e, *id*. ¶ 42; Count III, violation of 32 M.R.S.A. § 10201(1), *id*. ¶ 41 [sic] at 6; Count IV, violation of 32 M.R.S.A. § 10201(2), *id*. ¶ 43; Count V, violation of 32 M.R.S.A. § 10201(3), *id*. ¶ 45; Count VI, fraud, *id*. ¶ 47; Count IX, negligent misrepresentation, *id*. ¶ 55; Count X, violation of 18 U.S.C. § 1961 *et seq*. (RICO), *id*. ¶ 57; and Count XI, conspiracy, *id*. ¶ 59. Clarkson is also alleged to have breached a contract. *Id*. ¶ 52 (Count VIII). The plaintiff's memorandum in support of his motion for summary judgment cites no case law beyond a single reference to the legal standard applicable to motions for summary judgment and refers to statutory authority only in the most conclusory terms.

1. Count I. The plaintiff's memorandum of law in support of his motion argues that he is entitled to summary judgment against Trotter on Count I because Trotter induced Gowell to sell the promissory note to the plaintiff, citing 15 U.S.C. § 78t(a), and Gowell's liability on Count I has been established by his default. Plaintiff's Memorandum at 2-3. The plaintiff contends that Clarkson is liable on this count because he "participated in a common scheme to defraud" the plaintiff. *Id*. at 3. The statute of which Count I alleges a violation provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

> **(a)** To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> **(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j. Since the plaintiff contends that the promissory note at issue was not a registered security, Count I can only be construed to invoke subsection (b), which requires use of a deceptive or manipulative device in contravention of a rule promulgated by the Securities and Exchange Commission ("SEC") and the use of interstate commerce, the mails, or a national securities exchange. The plaintiff's statement of material facts includes no evidence to support the latter element of this claim, and he therefore is not entitled to summary judgment against either Trotter or Clarkson to the extent that this claim is asserted directly against either.

The plaintiff's memorandum of law suggests, albeit in minimal fashion, that he is entitled to summary judgment against Trotter on this claim because Trotter controlled Gowell, against whom default judgment has been entered on this claim. A person who controls any person liable for certain securities violations, including violation of section 78j, is jointly and severally liable for that violation, with certain exceptions. 15 U.S.C. § 78t(a). However, it has long been the rule in American law that a fact not controverted by a party who does not appear, and which is therefore taken as established against that party, may not be considered established against a party who does appear and contests it. *The Mary*, 9 Cranch (13 U.S.) 126, 143 (1815); *Pfanenstiel Architects, Inc.*

v. Chouteau Petroleum Co., 978 F.2d 430, 432 (8th Cir. 1992). *See also Quirindongo Pacheco v. Rolon Morales*, 953 F.2d 15, 16 (1st Cir. 1992) (court may investigate truth of any averment in the complaint after the entry of default). Accordingly, the lack of evidence in the summary judgment record to support all elements of the substantive claim under section 78j means that Gowell's default may not be used to determine Trotter's liability on Count I.

The same is true of the plaintiff's contention that Clarkson is liable as a co-conspirator with Gowell. In addition, Clarkson has properly disputed any allegation by the plaintiff that he conspired with Gowell. Clarkson Aff. ¶¶ 2(d), 2(f). There remain disputed issues of material fact as to this claim.

2. Count II. This count alleges violation of 15 U.S.C. § 77e, which prohibits sale or delivery after sale of unregistered securities by "any means or instruments of transportation or communication in interstate commerce" or the mails. The plaintiff relies on the same arguments to support his motion for summary judgment against Trotter and Clarkson on this count that he used with respect to Count I, Plaintiff's Memorandum at 2-3, and those arguments fail for the same reason.

3. Count III. In this count, the plaintiff alleges that the defendants violated 32 M.R.S.A. § 10201(1). He contends that Trotter "must be jointly and severally liable with Defendant[] Gowell" on this count because he acted as a broker-dealer for the sale of unregistered securities, he was "a main player in the common scheme to defraud Plaintiff" through the sale of the promissory note, and "[t]he false information and fraudulent representations made to Plaintiff by Defendant Gowell came directly from Defendant Trotter." Plaintiff's Memorandum at 3. His argument for Clarkson's liability on this count is identical to his argument for Clarkson's liability on all counts asserted against Clarkson other than the breach of contract claim — that Clarkson participated in a common scheme to defraud him and

furthered the scheme "by issuing a worthless bond guaranteeing payment of the Promissory Note." *Id*.

The Maine statute upon which this claim is based provides as follows:

> In connection with the offer, sale or purchase of any security, a person shall not, directly, or indirectly:
>
> **(1). Fraud**. Employ any device, scheme or artifice to defraud . . .

32 M.R.S.A. § 10201.[3] The plaintiff's statement of material facts includes evidence that Gowell made misleading statements to the plaintiff in connection with the sale of the promissory note. Nothing in the statement of material facts, however, provides evidence that these statements "came directly from" Trotter. The only evidence provided by the plaintiff that Trotter himself made any misrepresentations to the plaintiff are the assertions that Trotter "failed to inform Plaintiff that Trotter was not licensed as a broker/dealer in Maine or exempt from licensing," and that he "failed to disclose to [the plaintiff] the material fact that Tangent [the insurance company that issued the bond guaranteeing the promissory note at issue] was not licensed or authorized to do business in the State of Maine." Plaintiff's Aff. ¶¶ 12, 19. The plaintiff must accordingly be relying on these statements and the assertion that Trotter acted together with other defendants "in a common scheme to deceive" him, *id*. ¶ 25, as the evidentiary support for the claim asserted against Trotter in Count III.

There is no reported case law construing 32 M.R.S.A. § 10201, but it is taken from the Uniform Securities Act of 1985. 32 M.R.S.A. ch. 105, introduction. Unfortunately, there is no reported case law on point construing this section of the Uniform Securities Act from the other jurisdictions that have adopted it. In the absence of any such authority, I conclude that the Maine

[3] A private right of action for violation of section 10201 is created by 32 M.R.S.A. § 10605(1).

Law Court would hold that Trotter's failure to inform the plaintiff that Trotter was not a licensed broker-dealer in securities or exempt from licensing requirements and that the insurance company that issued the guarantee of the promissory note was not licensed or authorized to do business in Maine do not constitute a device, scheme or artifice to defraud, within the meaning of 32 M.R.S.A. § 10201(1). The conclusory allegation that Trotter engaged in a common scheme to deceive the plaintiff is not sufficiently specific to meet the evidentiary standards for the granting of summary judgment. *Magee v. United States*, 121 F.3d 1, 3 (1st Cir. 1997).

Clarkson disputes every fact asserted by the plaintiff in his statement of material facts that could possibly be construed to support a claim against Clarkson on Count III, Clarkson Aff. ¶¶ 2(b)-(f), and the plaintiff accordingly is not entitled to summary judgment against Clarkson on this count.

4. Count IV. This count alleges a violation of 32 M.R.S.A. § 10201(2) by Trotter and Clarkson. For the reasons stated above with regard to Count III, the plaintiff is not entitled to summary judgment against Clarkson on this count.

The relevant portion of the Maine statute at issue for purposes of this claim against Trotter provides as follows:

> In connection with the offer, sale or purchase of any security, a person shall not, directly or indirectly:
>
> * * *
>
> **(2). Untrue statements, material omissions**. Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . .

32 M.R.S.A. § 10201(2). The problem here for the plaintiff is that the only substantive allegations against Trotter included in the statement of material facts are omissions which, even if the court were to assume *arguendo* that they were material, have not been shown by the plaintiff to be "necessary

in order to make" statements made by Gowell, the only defendant alleged in the statement of material facts to have made untrue statements directly, "not misleading." *Compare* [Plaintiff's] Statement of Material Facts (Docket No. 25) ¶¶ 12, 14-16 *with* ¶¶ 11, 18. It is highly unlikely in any event that section 10201(2) could be construed to make one person liable for omitting to state a material fact that would make the statement of another person not misleading.

I conclude that the plaintiff is not entitled to summary judgment against Trotter on Count IV.

5. Count V. This count alleges violation by Trotter and Clarkson of 32 M.R.S.A. § 10201(3), which provides:

> In connection with the offer, sale or purchase of any security, a person shall not, directly or indirectly:
>
> * * *
>
> **(3). Deceptive Practices**. Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

For the reasons stated above, the plaintiff is not entitled to summary judgment against Clarkson on this count. With regard to Trotter, the plaintiff offers no factual support beyond that discussed above.

The Maine Revised Securities Act does not define the words "fraud" and "deceit" beyond stating that they are "not limited to common law deceit." 32 M.R.S.A. § 10501(5). However, for the reasons set forth in my discussion of Count III above, I conclude that however those terms might reasonably be defined, the plaintiff has failed to provide evidence of an act, practice or course of business by Trotter that operated or would operate as a fraud or deceit upon the plaintiff sufficient to support the entry of summary judgment.

VI. Fraud. The evidence upon which the plaintiff relies to support his motion for summary judgment against Trotter and Clarkson on this count is the same evidence set forth in my discussion of Count

III. Under Maine law,

> [t]he elements of fraud are: (1) the making of a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of whether it is true or false; (4) for the purposes [sic] of inducing another to act upon it; and (5) justifiable and detrimental reliance by the other.

Harkness v. Fitzgerald, 701 A.2d 370, 372 (Me. 1997). The only allegations against Trotter in this regard are that he failed to inform the plaintiff of certain information.

> When a plaintiff alleges a failure to disclose rising to the level of a misrepresentation, the plaintiff must prove either (1) active concealment of the truth, or (2) a specific relationship imposing on the defendant an affirmative duty to disclose.

Fitzgerald v. Gamester, 658 A.2d 1065, 1069 (Me. 1995). The plaintiff offers no support in his statement of material facts for the existence of any such relationship between him and Trotter. Nor does he offer evidence of active concealment of the information that Trotter allegedly failed to disclose; that is, there is no evidence that Trotter and the plaintiff ever came into contact with each other or that other circumstances presented Trotter with the opportunity to make this information known to the plaintiff, absent an affirmative duty for Trotter to make such disclosures.[4]

With regard to Clarkson, all of the material factual statements submitted by the plaintiff that might support a claim of fraud have been disputed by Clarkson.

Accordingly, the plaintiff is not entitled to summary judgment on Count VI against either Trotter or Clarkson.

7. Count IX. This count raises a claim of negligent misrepresentation. The plaintiff asserts no factual

[4] If the plaintiff means to make a claim of fraud against Trotter under a theory of *respondeat superior*, or a principal-agent relationship, *see, e.g., Crowley v. Dubuc*, 430 A.2d 549, 552 (Me. 1981), it is incumbent upon him to make that clear. He has not done so here, and his statement of material facts in any event lacks the necessary evidentiary support for such a theory.

basis for this claim that is any different from that presented in connection with the claims discussed previously. The Maine Law Court has adopted section 552 of the Restatement (Second) of Torts "as the appropriate standard for negligent misrepresentation claims." *Perry v. H. O. Perry & Son Co*., 711 A.2d 1303, 1305 (Me. 1998). That section provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 522(1) (1977). The factual allegations included in the plaintiff's statement of material facts, viewed in the light most favorable to Trotter, do not support a finding that Trotter had a pecuniary interest in the sale of the promissory note to the plaintiff. Restatement (Second) of Torts § 552, comment c ("The rule stated in Subsection (1) applies only when the defendant has a pecuniary interest in the transaction in which the information is given.").

Even if the allegations included in the plaintiff's statement of material facts that Trotter acted as a broker-dealer for the sale of unregistered securities issued by Legend Sports, Inc., Plaintiff's Aff. ¶ 2, and that Gowell, employed by Trotter to sell such securities in Maine, sold a promissory note issued by Legend Sports to the plaintiff, *id*. ¶¶ 2, 4 & Amended Complaint, Exh. A, could be construed to establish that Trotter was acting in the course of his business while failing to make certain information known to the plaintiff, thereby allowing an inference that Trotter had a pecuniary interest in the sale to the plaintiff, Maine law holds that "for purposes of *negligent* misrepresentation, . . . silence rises to the level of supplying false information when such failure to disclose constitutes the breach of a statutory duty," *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996)

(emphasis in original). As noted previously, the plaintiff has neither identified any such duty running to him from Trotter nor provided any evidentiary support for the existence of such a duty.

As is the case with the claims discussed previously, Clarkson has placed in dispute any material facts included in the plaintiff's statement of material facts that could possibly be construed to provide the basis for a claim of negligent misrepresentation against Clarkson.

The plaintiff is not entitled to summary judgment on Count IX against Trotter or Clarkson.

8. Count X. This count of the amended complaint alleges that Trotter and Clarkson violated an unspecified section of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*., "by reason of certain predicate acts, set forth below." Amended Complaint ¶ 57. "They did so . . . through the use of the United States mail to unlawfully obtain the funds of Plaintiff through false pretenses and the use of fraud in the sale of unregistered securities." *Id.* The plaintiff's statement of material facts makes no reference to the use of the mail to obtain the plaintiff's money. The plaintiff's memorandum of law does not identify the predicate acts upon which such a claim must be based, nor does it even begin to discuss the other necessary elements of a RICO claim that are set forth in 18 U.S.C. § 1962, which provides the only basis for a private cause of action under RICO, 18 U.S.C. § 1964. The evidentiary shortcomings of the plaintiff's summary judgment papers are particularly woeful with respect to this claim. The plaintiff's motion for summary judgment on Count X deserves no further discussion. *See generally United Transp. Union v. Springfield Terminal Co*., 869 F. Supp. 42, 48-49 (D. Me. 1994).

9. Count XI. In this count, the plaintiff alleges that Trotter and Clarkson, along with other defendants, "engaged in a conspiracy to defraud the Plaintiff and to convert the Plaintiff's Assets." Amended Complaint ¶ 59. This appears to be a common-law claim, since there is no citation to state

or federal statute. Maine law does not recognize an independent tort of conspiracy. *Cohen v. Bowdoin*, 288 A.2d 106, 109-10 (Me. 1972). Accordingly, the plaintiff is not entitled to summary judgment against either Trotter or Clarkson on this claim.

10. Count VIII (Clarkson only). In this count, the plaintiff alleges that Clarkson "breached the terms of the Financial Security Bond." Amended Complaint ¶ 52. His memorandum of law in support of his motion for summary judgment merely repeats this conclusory allegation. Plaintiff's Memorandum at 4. The factual allegation included in the plaintiff's statement of material facts that presumably relates to this claim is the assertion that Clarkson has not made payment pursuant to the bond. Plaintiff's Aff. ¶ 20. Even the most cursory reading of the bond, attached to the amended complaint as Exhibit B, will reveal that it does not obligate Clarkson to make any payment. Even if the plaintiff meant to argue that Clarkson should be held personally liable as the principal of the entity that *is* liable on the bond, something which he has not done even by the most indulgent possible reading of his summary judgment papers, Clarkson's affidavit effectively disputes any factual allegations included in the plaintiff's statement of material facts that could possibly be construed to support such a theory of recovery. The plaintiff is not entitled to summary judgment against Clarkson on Count XIII.

B. Defendants Gowell and Staples

The plaintiff's memorandum of law includes a request for the entry of default judgment against defendants Gowell and Staples, against whom the clerk has entered defaults, in the amount of the promissory note, plus interest, the maximum civil penalty under 32 M.R.S.A. § 10603(1)(A),[5]

[5] This penalty does not appear to be available in actions brought by private parties. 32 M.R.S.A. § 10605(1).

and treble damages and attorney fees under 18 U.S.C. § 1964(k).[6] Plaintiff's Memorandum at 2.

While a judgment will generally be entered without hearing if the defaulted defendant does not contest the amount prayed for, and if the claim is for a sum certain or a sum that can be made certain by computation, 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2688 at 63 (3d ed. 1998), when the defaulted defendant is alleged to be jointly liable with one or more defendants who have appeared, judgment should not be entered against the defaulted defendant until the matter has been adjudicated with regard to all defendants, *id*. § 2690 at 73. *See also Frow v. De La Vega*, 15 Wall. (82 U.S.) 552, 554 (1872); *Hunt v. Inter-Globe Energy, Inc.*, 770 F.2d 145, 148 (10th Cir. 1985). That is the case here. Gowell and Staples are alleged to be jointly liable with Trotter and Clarkson on all counts of the amended complaint with which each is charged. Judgment for or against Trotter and Clarkson will affect the availability of judgment against Gowell and Staples. *See, e.g., Gulf Coast Fans, Inc. v. Midwest Elec. Importers, Inc.*, 740 F.2d 1499, 1512 (11th Cir. 1984). Accordingly, entry of default judgment against Gowell and Staples would not be appropriate at this time.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for

[6] Section 1964 has no subsection (k). Assumedly, the plaintiff meant to cite subsection 1964(c).

which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 20th day of April, 1999.

_____

David M. Cohen
United States Magistrate Judge